IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

8

No. 8097

LEE BOW SING and LEE BOW HOY,

Appellants,

—vs.—

MARIE A. PROCTOR, United States Commissioner of Immigration and Naturalization at the Port of Seattle, Washington,

Appellee.

Upon Appeal from the District Court of the United States For the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellants, Lee Bow Sing and Lee Bow Hoy, are of the Chinese race and were born in China. They arrived from China at Seattle on June 25, 1935, and applied for admission into the United States as citizens thereof by virtue of being foreign born sons of a native citizen of the United States named Lee Leng

Tue, who accompanied them to this country. Following the usual hearings before a legally constituted Board of Special Inquiry at the Seattle Immigration Station they were denied admission for the reason they failed to establish their claim of relationship to their alleged father, from which decision they appealed to the Secretary of Labor, Washington, D. C., who dismissed the appeal and directed that they be returned to China. Thereafter they filed a petition for a Writ of *Habeas Corpus* in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the judgment of the District Court denying the said petition.

LAW AND AUTHORITIES

Section 23 of the Immigration Act of 1924 (8 USCA 221) places the burden of proof upon applicants for admission into the United States, as do the Chinese Exclusion Laws, *White v. Chan Wy Sheung*, 270 Fed 764 CCA9; *Christy v. Leong Don*, 5 Fed. (2) 135 CCA5, *writ of certiorari* denied 269 US 560.

Section 17 of the Immigration Act of February 5, 1917 (8 USCA 153) provides that Boards of Special Inquiry shall have authority to determine whether ap-

plicants for admission shall be allowed to land or shall be deported and that

> " * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor: * * *."

In *Quon Quon Poy v. Johnson*, 273 US 352, the Supreme Court said:

> "and that unless it appears that the Department officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the *writ of habeas corpus* without proceeding further."

And for other similar authorities, see *Chin Ching v. Nagle*, 51 Fed (2) 64 CCA9.

In *Yep Suey Ning v. Berkshire*, 73 Fed. (2) P751, this Court held that

> "It must be borne in mind that this court must not substitute its judgment for that of the immigration boards on matters of fact."

In *Woo Suey Hong v. Tillinghast*, 69 Fed (2) 94, CCA1, the Court said:

> "It is not sufficient that this court upon the evi-

dence might have come to a contrary conclusion. Each board is the judge of the weight to be given to the evidence."

The Immigration officers are exclusive judges of weight of testimony and credibility of witnesses appearing before them.

Jew Hong Sing v. Tillinghast, 35 Fed (2) 559 CCA1,

Masamichi Ikeda v. Burnett, 68 Fed (2) 276 CCA9,

Mastoras v. McCandless, 61 Fed (2) 366 CCA3,

Ngai Kwan Ying v. Nagle, 62 Fed (2) 166 CCA9.

"In reviewing the case, we must bear in mind the well-settled rule in cases of this character, namely, if there is a possibility of disagreement among reasonable men as to the probative effect of the discrepancies or contradictions in the testimony of the witnesses, the finding of the administrative board will not be disturbed."

Haff v. Der Yam Min, 68 Fed. (2) 626 CCA9.

ARGUMENT

It is conceded that Lee Leng Tue, the alleged father of the appellants is a citizen of the United States. The sole issue is the question of whether the appellants are in fact sons of Lee Leng Tue. The burden of proof is on them to prove their claim of relationship. The Immigration officers are not required to disprove their assertions. In cases of this character it has for many

years been the established practice of the Immigration officials to question the applicants for admission on matters pertaining to their personal and family history, their place of residence, neighbors and events with which they could be expected to be familiar. If their testimony is in substantial agreement on material points it is presumed that the relationship claimed has been proved. If, on the other hand, the applicant and witnesses disagree as to important matters which they should or would know if the claimed relationship exists, there is a strong probability that the claim of relationship is false. This method of testing the veracity of the applicants and witnesses has long been upheld by the courts. *Ex parte Jew You On*, 16 Fed (2) 153; *Siu Say v. Nagle*, 295 Fed 676 CCA9; *Yep Suey Ning v. Berkshire*, 73 Fed (2) 745 CCA9.

The findings on appeal by the Board of Review at Washington approved by the Assistant to the Secretary of Labor cover only a few of the discrepancies raised by the Board of Special Inquiry at Seattle and are set forth on the blue sheets, number 1 to 6, contained in the certified record of the case, some of which will be here discussed:

The finding beginning with the last paragraph on page 1 reads:

"In 1922 when an applicant for a citizen's return

certificate at New York, Lee Leng Tue after being sworn was asked whether had any other name than Lee Leng Tue and answered, "No." He was then asked, "Were you ever married?" and answered "Yes, but my wife died last year." Asked the name of his wife he answered "Chen She; I have one boy and one girl—Lee Way, about 20; one daughter, Lee Shew, 13." Then being asked "What is your marriage name?" answered Lee Tue Sing." Later in the same hearing he was asked "If you returned to the U. S. in 1898 and have not been out of the U. S. since that time, how can you be the father of two children, one about 20 years of age and one 13 years of age, who have always lived in China?" to which the record indicates that he made no answer. Also in the same hearing Lee Leng Tue was asked, "Did your father have any brothers in the United States?" and answered, "Yes, one older brother, Lee Gee Toy; he died in China about 20 years ago." On his return, July 20, 1924, at the same time that Lee Leng Tue was recorded as claiming a son of the name given by and for the older of the present applicants when asked to give the names of wives living or dead, was recorded as answering, "Low She—dead" before giving the name which corresponds with that of the present applicants' alleged mother. In answer to the question, "How many children have you ever had?" Lee Leng Tue was recorded as answering, "One." The name given for Lee Leng Tue's wife and the mother of these applicants is Ng Shee. The present examination shows the following testimony on the part of Lee Leng Tue:

"Q. Did you ever have any other wife than Ng Shee?

A. No.

Q. Did you ever have a wife by the name of Low Shee?

A. No.

Q. Can you explain why you testified at New York April 6, 1922, that your wife died last year (CR10)?

A. Yes, my first wife died little over 20 years ago.

Q. What was her name?

A. Low Shee.

Q. Were any children born to Low Shee by you?

A. No.

Q. Did you ever know a person by the name of Lee Way or a girl by the name of Lee Shew?

A. No.

Q. Did you ever have a wife by the name of Chen She?

A. No.

Q. Can you explain why you testified at New York April 6, 1922, that your deceased wife's name was Chen She?

A. Yes, I had a wife Chen She.

Q. How many wives have you actually had?

A. Two. That was a mistake about Low Shee I didn't remember my first wife's name.

Q. Can you explain why you testified at New York April 6, 1922, that you had a son

Lee Way about 20 and a daughter Lee Shew about 13?

A. I did not make such a statement; I haven't any children by those names.

Lee Leng Tue also has now said that his father never had a brother."

Where a witness previously described the members of his family and described them vastly differently when bringing a child to this country, such discrepancies are of sufficient importance to justify the rejection of his testimony.

Moy Chee Chong v. Weedin, 28 Fed (2) 263 CCA9,

Fong Lung Sing v. Day, 37 Fed (2) 36 CCA2,

Chin Lim v. Nagle, 38 Fed (2) 474 CCA9,

Soy Sing v. Chinese Inspector, 47 Fed (2) 181 CCA2,

Wong Shong Been v. Proctor, 79 Fed (2) 881 CCA9.

Finding beginning with last paragraph on page 2 reads:

"According to the birthdates February 11, 1924, and March 4, 1924, both of which have been given by the alleged father for the older of these applicants, he was less than 11½ years old at the time of his examination. The members of the examining board judged him to be not less than fifteen years of age and the medical examiner at Seattle stated in writing that he was of the opinion regarding the applicant that "due to his facial ex-

pression, teeth, sexual development, and general characteristics, he is between the ages of 15 and 17 years. This is also borne out by X-ray photographs taken by Dr. Curtis Thomson, X-ray Consultant, Seattle Marine Hospital, whose opinion is that the alien is 'not less than 15 and probably not more than 17 or 18 years'." The medical officer supplemented this written statement in his appearance before the Board stating that, "In my opinion he is between the ages of 15 and 17 years. This opinion is based on his facial expression which is that of a youth in his late teens, his teeth, which are all erupted except the third molars, his sexual development and general characteristics which are both those of a fairly mature youth. The permanent teeth are fully erupted at approximately 15 years of age with the exception of the 3rd molars and in this alien they show evidence of having been erupted for at least several years." Opportunity was afforded for the examination of the applicant by a private physician and the record contains a statement of such a physician that, "Examination of Lee Bow Shing, held at the Seattle station, because of a question of his age, shows on X-ray examination, normal ossification for twelve years, with epiphyseal lines for that age well marked." In view of the detailed statement presented by the medical officer and X-ray Consultant, as well as the photographic indication that the applicant is considerably beyond eleven years of age, it is not believed that this statement of the private physician offsets the evidence that the older of these two applicants is actually of an age which makes his claimed relationship to the alleged father impossible."

The asserted age of appellant Lee Bow Sing is seriously disputed by the Immigration officials. Two dates for his birth are given, February 11, 1924, and

March 4, 1924. If either of the said dates are correct, Lee Bow Sing was not more than 11 years and 5 months of age at time of his examination before the Board of Special Inquiry. His age must fit his alleged father's essential trip to China. It is shown that the alleged father arrived from China on May 7, 1898, and remained continuously in the United States until 1922. He was issued a return certificate by the New York Immigration office in April, 1922, and departed via Vancouver, Canada, for China during July 1922. The three members of the Board of Special Inquiry, after observing and hearing Lee Bow Sing testify, set forth their opinions in the record to the effect that he was at least 16 years, 16 or 17 years, and between 15 and 17 but not less than 15 years of age, respectively. Certain bones and joints of Lee Bow Sing were X-rayed by Dr. Curtis Thompson, X-ray consultant for the United States Marine Hospital at Seattle. After a physical examination was made of Lee Bow Sing and with the aid of X-ray pictures Dr. Seth of the United States Public Health Service, who is attached to the Immigration Station as medical examiner of aliens, filed a letter equivalent to a certificate, appeared before the Board of Special Inquiry, and stated that Lee Bow Sing was between 15 and 17 years of age.

Full opportunity was given Lee Bow Sing to be

examined by outside physicians of his own choice, and thereafter was examined by Dr. E. B. Schrock of Seattle, who submitted a letter to the effect that the appellant was 12 years of age. Dr. Schrock did not testify before the Board of Special Inquiry, and consequently the Board was deprived of the opportunity of inquiring into his qualifications, experience, in determining ages and possible bias. His opinion is based entirely on X-ray pictures made under his direction, which were not submitted in evidence. He made no comment on the appellant's physical development. His letter was not prepared under any oath of office. The result of his actions in behalf of the appellant does not meet the "best evidence" rule. Dr. Schrock's opinion falls far short of being sufficient to overthrow the opinions of the Board members and of Dr. Seth, all of whom were under oath from date of their employment by the United States to faithfully perform their duties and who are experienced in estimating the ages of applicants appearing before them.

The appellant's contention that the Board of Special Inquiry at Seattle did not consider Dr. Schrock's letter is conceded, but their allegation that the said letter was thrown out by the Board of Review at Washington is, to say the least, inconsistent with the facts. It is shown that the Board of Special Inquiry record

with all Exhibits was on July 25, 1935, forwarded on appeal to the Secretary of Labor. The letter of Dr. Schrock is dated July 29, 1935, and being received later could not have been considered by the Board of Special Inquiry at Seattle and no request was made for a reopening to permit of its consideration. However, at the request of the appellant the said letter was sent to th Secretary of Labor where it was duly considered by the Board of Review and made the subject of a finding.

Counsel for the appellants quote on page 10 of their brief an exparte statement purported to have been made by Dr. Maurice M. Pomranz as an authority on age determination through the use of X-rays. The quoted statement is not subject to verification here. It is not shown that Dr. Pomranz is an authority on the particular point here involved, or that he is of the same opinion now, or that he is the author of any text book used by the medical profession. It is apparent that Dr. Pomranz was employed to give his opinion in behalf of a Chinese applicant for admission named Chin Ging Thing whose appeal was pending before the Immigration Service. The opinions of the Board of Special Inquiry members and of Dr. Seth are based on well grounded facts and are not impeached in the slightest degree by the letter of Dr. Schrock or by the purported expression of Dr. Pomranz, and the "guess" of counsel

for the appellants is without merit.

Counsel for appellants advance the opinion of Dr. Pomranz who says that age cannot be determined by use of X-rays and on the other hand present the opinion of Dr. Schrock who says that he did determine the age of Lee Bow Sing through the use of X-rays. They present a negative and an affirmative on the same point. One nullifies the other, and therefore both should be stricken from consideration. Also, they accept in good grace the opinion expressed in the letter of Dr. Schrock, but reject the opinion set forth in the letter of Dr. Seth.

We submit that Dr. Seth is a medical officer, regularly appointed and serving under an oath of office, of the United States Public Health Service, and that he is attached to the United States Immigration station at Seattle, as is provided for by Sec. 16 of the Immigration Act of 1917 (8 USCA 152), and that he is not required to be sworn in each or any case requiring his official services. His letter and his statement before the Board of Special Inquiry are competent evidence as held in the United States *ex rel Fong On v. Day*, 54 Fed (2) 990 CCA2, which cites with approval various decisions of this Court, but rejects some of the reasoning in the case of *Wong Bing Pon v. Carr*, 41 Fed (2) 604 CCA9, cited by appellants.

There is a variance of at least 3 years and 7

months between the age claimed by Lee Bow Sing and the age set by the government officials.

In *Young Fat v. Nagle,* 3 Fed (2) 439 CCA9, the appellant claimed to be 8½ years of age. The government physician, several immigrant inspectors and the Board members held that the appellant was between 11 and 14 years while one believed he was about 9 years old. This Court cited *Wong Fook Ngoey v. Nagle,* 300 Fed 323 CCA9 and *Fong Lim v. Nagle,* 2 Fed (2) 971 CCA9, and said:

> "The several discrepancies in the estimates of the age of the boy are noticeable; but they are far from being such as to justify the conclusion that there was no substantial support for the opinion that the boy was well over 8½ years old. * * * the case being one of conflicting evidence, upon which members of the board have exercised their judment, it will not be disturbed by the courts."

And this logic is supported by *Ng Mon Tong v. Weedin,* 43 Fed (2) 718 CCA9 and *Fong On v. Day.* 54 Fed (2) 990 CCA2. Photograph of each appellant and X-ray pictures of Lee Bow Sing made at the expense of the government are made Exhibits.

Finding beginning with last paragraph on page 3 reads:

> "The alleged father testified that his mother, after living continuously with his family for thirteen years prior to her death, died "C. R. 22-5-10"

(May 10, 1933) in his house at 31 Dok Ho Num Street, which is claimed to have been the home of these applicants. He also stated that both of these applicants attended the funeral of their paternal grandmother. Both applicants testified that they had never seen either of their grandparents. The attorney conceding the seriousness of this discrepancy would seem to attempt to maintain that it is "of doubtful existence" the ground for this being that following the recording of the alleged father's statement in answer to the request to describe his mother "Chun Shee, released feet, she died CR 22-5-10, at No. 31 Dok Wo Nam Street, in my house; that date is by new calendar" an error was made either by the examining officer or by the stenographer in giving in parenthesis the American equivalent of the Chinese date "C. R. 22-5-10" so that it appears in the record as (May 10, 1923) instead of May 10, 1933. This date as erroneously given in the parenthesis is no part of the alleged father's testimony and his statement that these applicants attended the funeral of his mother plainly shows that he intended to say what the record shows that he did say that she died in the Chinese equivalent of the year 1933. Also, the alleged father has designated the sleeping place of his mother prior to her death in the household of which these applicants are claimed to have been members which he would not have done if he had intended to say that she died before either of them was born. Certainly the older of the applicants would have a clear memory and the younger of the applicants might be expected to have some memory of their grandmother if she had in fact, as the alleged father testifies, been a member of their household up to two years ago."

Amplifying the foregoing discrepancy, the alleged father testified that after being sick 4 or 5 days and

at the age of 80 years his mother died CR 22-5-10, corresponding to the American calendar of 1933, in the house in which he and the appellants were living; that both appellants attended the funeral with he and his wife, all going to the burial ground by automobile; that eight musicians rendered music at the funeral services and that he took both appellants to worship at his mother's grave during the early part of 1935. Lee Bow Sing says that he never saw either of his father's parents, that both died years ago; does not know their names and never worshipped at their graves. Lee Bow Hoy says that he never saw either of his father's parents; that he never learned whether they were living or dead; that he never worshipped at their graves and does not know where they are buried. If these appellants were living in the same house with their alleged father at the time of death of his mother they should have full knowledge of the death and circumstances connected with the funeral. It is believed this discrepancy is fatal to the appellants' claim of relationship.

Chin Shue Teung v. Tillinghast, 33 Fed (2) 122 CCA1,

Weedin v. Yip Kim Wing, 41 Fed (2) 665 CCA9,

Weedin v. Yee Wing Soon, 48 Fed (2) 36 CCA9.

Finding, 2nd paragraph page 4 reads:

"Both applicants describe the house in which they claim to have been living with their alleged father

> as a two story building, stating that their quarters were on the second floor. They describe the bedroom in which the older of the applicants slept as being on the same floor with the bedroom in which the alleged father and his wife slept and they both testify that the ground floor of that building has been vacant and was vacant at the time that they left there to come to the United States. The alleged father described this building at one time as a three story structure and again as a building two and a half stories in height with the sleeping room occupied by the older of the two applicants on the top floor above the second story. The alleged father also stated that the ground floor of that building was occupied by the family of Lum Jok Yu whose members had been living there since the second month of this year. Certainly even children of the ages of these applicants might be expected to know that the apartment immediately below theirs was occupied particularly if as the alleged father's testimony indicates that occupation was a matter of recent occurrence."

The details concerning the aforementioned discrepancy are further explained. It will be noted that both appellants stated that there was no stream or body of water near their house. The alleged father testified that there is a river named Bak How Hon only one block from their house and which could be seen from the top of their house. Such a discrepancy furnishes reasonable proof that the appellants did not live in the house claimed.

Counsel for the appellants contend that the hearing before the Board of Special Inquiry is unfair for

the reason that Dr. Seth and Interpreters Chin Ham Kee and Jick Chan were not sworn, but concede that Dr. Seth is a member of the U. S. Public Health Service staff. They do not allege that any part of the testimony of the witnesses is other than as is shown in the record. Neither appellant was sworn owing to the fact they both claimed to be under 12 years of age and for the further reason they did not understand the nature of an American oath and such an oath would not be binding on their conscience.

Interpreters Chin Ham Kee and Jick Chan were regularly appointed official Chinese interpreters under authority of the Civil Service regulations and both have been continuously employed at the Seattle Immigration station for more than five years, their last oaths of office were subscribed to on November 27, 1933, copies of which were made Exhibits.

Interpreter Ong Jeong Poy was regularly employed as an official interpreter until August 19, 1933, when his services were discontinued on account of reduction of the force. However, he has been since frequently employed on a per diem basis without appointment, which will explain why it was necessary that he be sworn in the present case.

The three named interpreters served in the case of *Weedin v. Chin Guie*, 62 Fed (2) 351 CCA9, and

each are mentioned in the government's brief, No. 6931.

The record shows that the appellants were represented by Attorney Roger O'Donnell, Esq., on appeal before the Department at Washington. No request was made by said attorney that the case be reopened by the local Board of Special Inquiry and no exception was taken to the status of the interpreters or of Dr. Seth. In the absence of such a request being made, it may be presumed that there is no jurisdictional defect in the record. See *Fong On v. Day,* 54 Fed (2) 990 CCA2.

In *Fong Kong v. Nagle,* 57 Fed (2) 138 CCA9, the Court held that the Immigration authorities are entitled to receive and determine the questions before them upon any evidence that seems worthy of credit.

It was held in *Jeung Bow v. United States,* 228 Fed. 868-871 CCA2, that an official interpreter acting under oath of office is not required to be sworn in each case; if otherwise it would be like swearing a judge anew at each trial. *Lee Sim v. United States,* 218 Fed 432 CCA2 holds that an official interpreter need not be sworn.

In principle or in fact there is no difference between the official status of the interpreters herein mentioned and a member of a Board of Special Inquiry.

Each subscribe to the same oath of office. This Court has expressly ruled that Board members are not required to take an oath preliminary to each particular hearing. *Moy Chee Chong v. Weedin*, 28 Fed (2) 263 CCA9.

The law is that it will be presumed until the contrary is shown, that persons acting in a public office have been duly appointed and are acting with authority. *Keeley v. Sanders*, 99 US 441. No evidence was offered during the court proceedings to show that the actions of Dr. Seth or of the interpreters was not according to law.

The assertion of the attorneys for appellants that Boards of Special Inquiry were created by the Act of February 5, 1917, is not correct. Such Boards were created by Sec. 25 of the Immigration Act of March 3, 1903, and reenacted by the Act of February 20, 1907 and Act of February 5, 1917.

It is admitted that the statements of the two appellants is in practical agreement and it is possible they are brothers even if one is several years older than claimed. The material point is they do not agree with the testimony of their alleged father on various important details and events. If some part of the alleged father's testimony is believed it does not follow that the rest of his conflicting testimony must be ac-

mission against interest may be accepted as being true but an assertion in favor of a witness does not have to be believed.

It is common knowledge that all Chinese arriving in the United States and those applying for return certificates during the past twenty-five years are questioned each time concerning their marital status and description of their children. The Chinese know that they cannot bring to this country children whom they did not claim when given an opportunity to do so, consequently in many instances they lay the foundation and describe children that are fictitious in the hope of financial gain in the future. So many cases of this character have been before the courts that it is not thought necessary to cite any of them.

Whether there is any resemblance between the photographs of the appellants and their alleged father is immaterial. Resemblance does not prove relationship or off-set material discrepancies. See *Wong Hon Ping v. Haff*, 63 Fed (2) 448 CCA9; *Louie Lung Gooey v. Nagle*, 49 Fed (2) 1016 CCA9, and the deported case of *Wong Som Yin v. Nagle*, 37 Fed (2) 893 CCA9, cited by the appellants.

Counsel for appellants suggest that should the Court sustain the deportation order in case of Lee Bow

Sing, the older boy, that the order should be reversed as to Lee Bow Hoy, the younger boy. Both are governed by the same testimony, with exception of the question of age against the older boy. Under these circumstances a doubt as to one extends to the other. *Fong You Tun v. Nagle*, 293 Fed. 900 CCA9; *Hong Tong Kwong v. Nagle*, 299 Fed. 588 CCA9.

CONCLUSION

The appellants were accorded a fair hearing by the Immigration officials and failed to sustain the burden which was upon them to establish their claim of relationship to their alleged father. The evidence does not constitute convincing proof that either of the appellants is a son of the alleged father and is not of such a nature as to require, as a matter of law, a favorable finding in that respect. The discrepancies in the testimony constitute evidence upon which the Immigration officials could reasonably arrive at their excluding decision. The said officials did not abuse their discretion committed to them by the statutes, and their excluding decision is not arbitrary, capricious or in contravention of any rule of law, or in conflict with any principle of justice; hence, it is final. The District Court did not commit error in denying the *Writ of*

Habeas Corpus, and its judgment and order should be affirmed.

Respectfully submitted:

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